# Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1208 OF 2009
ABU SAMAH, MOHD HISHAMUDIN AND KANG HWEE GEE JJCA
14 JANUARY 2011

*Contract — Termination — Property development agreement ('PDA') — Right to terminate — Respondents granted appellant term of 15 years to develop property — Respondents issued termination notice 13 years and three months later on grounds of inability to perform — Construction of terms of PDA — Whether notice issued premature and unlawful — Whether upon proper construction of PDA appellant under obligation to commence and complete development within 15 year period — Whether time was of essence of PDA — Whether PDA contained provision for automatic right to extension of agreement if appellant obtained development order at eleventh hour — Whether appellant's failure to apply for DO amounted to repudiatory breach of contract*

Bungsar Hill Holdings Sdn Bhd ('the first respondent'), the registered owner of approximately 54 acres of land in Damansara Heights, granted Editry Sdn Bhd ('the second respondent') the right to develop three parcels of adjoining lands in Damansara Heights with an area approximately of 15.5 aces ('the development property'). Thereafter, by way of a property development agreement ('the PDA') dated 7 January 1993, the respondents granted Damansara Realty Bhd ('the appellant') a term of 15 years to develop the development property ('development rights'). As the appellant's right to exercise the development rights arose on 4 July 1994 it would, pursuant to the PDA, expire on 4 July 2009. However, 13 years and three months later, the respondents issued a notice of termination by way of a letter dated 25 October 2007 ('the termination notice'), giving the appellant 30 days' notice of their intention to terminate the PDA. Aggrieved by the termination notice the appellant commenced an action against the respondents for various declarations and orders to the effect that the respondents' termination notice was premature and unlawfully issued. The appellant stated that it was willing and able to exercise its rights under the PDA but that it was merely waiting for the right moment. It thus contended that as at 25 October 2007 it had the remaining unexpired 20 months under the PDA to develop the property and that as such the termination notice was premature and bad in law. It was the appellant's case that it had been given 15 years to commence development by obtaining a development order ('the DO') from the Dewan Bandaraya Kuala Lumpur ('DBKL') and that once it had obtained the DO it was deemed to have commenced development and by virtue of s 1.3 of the Fourth Schedule to the

PDA, the period for development would be automatically extended for a period of three years beyond the expiration date of 4 July 2009. As such, the appellant argued that although it had not even applied for a DO as at 25 October 2007, it had nevertheless not repudiated the PDA because the PDA contained a provision for the automatic right to extension of the agreement in the event the appellant obtained the DO even at the eleventh hour. In response the respondents submitted that the appellant was under an obligation to commence and complete the development of the property within the 15 year period commencing 4 July 1994 and expiring on 4 July 2009 but after a lapse of more than 13 years the appellant had not taken any steps to commence development. They further submitted that since the appellant had not even submitted an application for a DO to the DBKL as late as 25 October 2007, there was no possibility for the appellant to complete the development by 4 July 2009. The respondents thus submitted that the appellant had by its conduct committed a repudiatory breach of the PDA and that this entitled them to issue the notice of termination on 25 October 2007.

**Held**, dismissing the appeal with costs to be taxed:

(1) (per **Mohd Hishamudin JCA**) This court agreed with the view taken by the High Court judge, in that, the PDA imposed on the appellant an obligation not just to commence development by applying for and obtaining a DO but also an obligation to complete the development of the entire 15.5 acres within the 15 year period. Clauses 3.1, 5.2 and s 1.3 of the Fourth Schedule of the PDA lend support to such an interpretation (see paras 40–41).

(2) (per **Mohd Hishamudin JCA**) As the PDA was a commercial contract it had to be construed in a commercially sensible manner, ie in a manner in which a reasonable commercial person would construe it. In the circumstances it could not have been the intention of the parties that the appellant may commence development at any time within the 15 year period and that it was lawful for the appellant not to have commenced any development even after more than 13 years, because such an interpretation did not make any commercial sense (see paras 42–43).

(3) (per **Mohd Hishamudin JCA**) It was implicit in the provisions of the PDA that time was of the essence of the contract. In any case, as provided under s 47 of the Contracts Act 1950, the appellant was not at liberty to take its time in carrying out the development (see paras 45–46).

(4) (per **Mohd Hishamudin JCA**) On the facts of the present case it was plain and obvious that the venture had been frustrated by the conduct of the appellant. The appellant's failure to even apply to DBKL for a DO as late as 25 October 2007 amounted to a repudiatory breach as it was a breach that went to the root of the contract. Even if the appellant was able to obtain the DO a few months before the expiration of the 15 year

period, it was still impossible for the appellant to carry out any substantial development in the development property let alone complete the development of the whole 15.5 acres. As such, the respondents were entitled to bring the contract to an end by accepting the implied repudiation (see paras 48–50).

(5) (per **Mohd Hishamudin JCA**) The appellant's contention that the PDA contained a provision for the automatic right to extension of the agreement in the event the appellant obtained the DO even at the eleventh hour was a far fetched interpretation of the terms of the PDA. It was found that such an interpretation was not a commercially sensible interpretation and rendered meaningless the purpose of the PDA. Further such an interpretation was contrary to the implied term of the PDA that time was of the essence of the contract (see para 56).

(6) (per **Kang Hwee Gee JCA**, dissenting) Time was not of the essence of the agreement. This was implicit from cl 1.2 of Schedule 4 of the PDA, which was intended to benefit both the parties by allowing the appellant to optimise the gain from the development by commencing it at the most opportune time it saw fit. In the circumstances, the rescission of the PDA by the respondent before the expiry of 15 years could only be justified under the doctrine of anticipatory breach in contract law. In the present case, given the fact that under the PDA the appellant had full control and management of all matters relating to the development it was too soon for the respondents to rescind the PDA by the termination notice dated 25 October 2007, merely on the ground that the appellant was incapable of completing the development before the expiry of the term of 15 years. An anticipatory breach based on inability to perform would require the respondents to show that the contract was in fact impossible of performance due to the other party's default. Further, to satisfy the requirement of completing the development before the term of 15 years, the appellant need not have to develop the whole development land but only a part thereof (see paras 58–59 & 66).

**[Bahasa Malaysia summary**

Bungsar Hill Holdings Sdn Bhd ('responden pertama'), pemilik berdaftar kira-kira 54 ekar tanah di Damansara Heights, memberikan Editry Sdn Bhd ('responden kedua') hak untuk membangunkan tiga bidang tanah yang bersempadan di Damansara Heights, dengan kawasan kira-kira 15.5 ekar ('pembangunan hartanah'). Selepas itu, melalui perjanjian pembangunan hartanah ('PPH') bertarikh 7 Januari 1993, responden-responden memberikan Damansara Realty Bhd ('perayu') tempoh 15 tahun untuk membangunkan pembangunan hartanah ('hak pembangunan'). Memandangkan hak perayu untuk menjalankan hak-hak pembangunan bermula pada 4 Julai 1994 akan, menurut PPH, tamat pada 4 Julai 2009. Walau bagaimanapun, 13 tahun dan tiga bulan kemudian,

responden-responden mengeluarkan notis penamatan melalui surat bertarikh 25 Oktober 2007 ('notis penamatan'), memberi notis perayu 30 hari, niat mereka untuk menamatkan PPH. Terkilan dengan notis penamatan, perayu memulakan tindakan terhadap responden-responden bagi pelbagai perintah dan deklarasi dan bahawa notis penamatan responden-responden 'pra-matang dan dikeluarkan secara tidak sah. Perayu menyatakan bahawa ia sanggup dan berupaya untuk melaksanakan hak-hak di bawah PPH tetapi ia hanya menunggu masa yang sesuai. Ia menghujahkan bahawa pada 25 Oktober 2007, ia mempunyai baki 20 bulan yang belum tamat di bawah PPH untuk membangunkan hartanah tersebut dan bahawa notis penamatan sedemikian adalah pra-matang dan cacat di sisi undang-undang. Ia adalah menjadi kes perayu bahawa ia telah telah diberi 15 tahun untuk memulakan pembangunan dengan mendapatkan satu perintah pembangunan ('PP') daripada Dewan Bandaraya Kuala Lumpur ('DBKL') dan bahawa setelah ia memperolehi PP, ia telah dianggap telah memulakan pembangunan dan oleh kerana s 1.3 Jadual Keempat PPH, tempoh untuk pembangunan akan secara automatik dilanjutkan kepada tempoh tiga tahun selepas tarikh tamat 4 Julai 2009. Oleh itu, perayu menghujahkan bahawa walaupun ia tidak memohon PP pada 25 Oktober 2007, ia tidak menolak PPH kerana PPH mengandungi peruntukan bagi hak automatik untuk melanjutkan perjanjian tersebut sekiranya perayu mendapat PP walaupun pada saat terakhir. Sebagai balasan, responden-responden menghujahkan bahawa perayu berada di bawah obligasi untuk memulakan dan melengkapkan pembangunan hartanah dalam tempoh 15 tahun bermula pada 4 Julai 1994 dan tamat pada 4 Julai 2009 tetapi selepas luput lebih daripada 13 tahun, perayu tidak mengambil apa-apa langkah untuk memulakan pembangunan. Mereka seterusnya menghujahkan bahawa memandangkan perayu tidak mengemukakan permohonan untuk PP kepada DBKL sebagai selewat 25 Oktober 2007, tiada kemungkinan bagi perayu untuk melengkapkan pembangunan pada 4 Julai 2009. Responden-responden menghujahkan bahawa perayu telah, melalui kelakuannya, melakukan pelanggaran pembatalan PPH dan bahawa ini memberi mereka hak untuk mengeluarkan notis penamatan pada 25 Oktober 2007.

**Diputuskan**, menolak rayuan dengan kos untuk ditaksirkan:

(1) (oleh **Mohd Hishamudin HMR**) Mahkamah ini bersetuju dengan pandangan yang diambil oleh hakim Mahkamah Tinggi, bahawa, PPH meletakkan kewajipan ke atas perayu untuk bukan hanya memulakan pembangunan dengan memohon dan mendapatkan PP tetapi juga kewajipan untuk melengkapkan pembangunan keseluruhan 15.5 ekar dalam tempoh 15 tahun. Fasal 3.1, 5.2 dan s 1.3 Jadual Keempat PPH menyokong tafsiran tersebut (lihat perenggan 40–41).

(2) (oleh **Mohd Hishamudin HMR**) Memandangkan PPH merupakan kontrak komersial, ia mesti ditafsirkan dengan cara komersial yang sesuai, iaitu dengan cara di mana seseorang komersial yang munasabah

akan mentafsirnya. Dalam hal keadaan ini, ia bukan niat pihak-pihak bahawa perayu boleh memulakan pembangunan pada bila-bila masa dalam tempoh 15 tahun dan bahawa ia adalah sah di sisi undang-undang untuk perayu tidak memulakan apa-apa pembangunan walaupun selepas lebih 13 tahun, kerana tafsiran sebegitu tidak komersial (lihat perenggan 42–43).

(3) (oleh **Mohd Hishamudin HMR**) Ia adalah tersirat di dalam peruntukan-peruntukan PPH bahawa masa adalah inti pati kontrak. Dalam apa jua keadaan, sebagaimana yang diperuntukkan di bawah s 47 Akta Kontrak 1950, perayu tidaklah bebas untuk mengambil masa dalam menjalankan pembangunan (lihat perenggan 45–46).

(4) (oleh **Mohd Hishamudin HMR**) Apabila fakta-fakta kes ini ia adalah yang nyata dan jelas bahawa usaha telah dikecewakan oleh perlakuan perayu. Kegagalan perayu untuk memohon PP daripada DBKL selewat-lewatnya 25 Oktober 2007 terjumlah kepada pelanggaran pembatalan kerana ia merupakan pelanggaran perkara pokok kontrak. Malah jika perayu memperolehi PP beberapa bulan sebelum tamat tempoh 15 tahun, ia masih mustahil untuk perayu untuk menjalankan apa-apa pembangunan yang besar dalam pembangunan hartanah apatah lagi melengkapkan pembangunan keseluruhan 15.5 ekar. Oleh itu, responden-responden berhak untuk menamatkan kontrak dengan menerima pembatalan tersirat (lihat perenggan 48–50).

(5) (oleh **Mohd Hishamudin HMR**) Hujahan perayu bahawa PPH mengandungi peruntukan bagi hak automatik untuk melanjutkan perjanjian itu sekiranya perayu mendapat PP walaupun pada saat terakhir adalah semata-mata tafsiran terma PPH. Ia didapati bahawa tafsiran sebegitu bukan tafsiran komersial munasabah dan tidak memberikan apa-apa makna kepada tujuan PPH. Seterusnya, tafsiran sedemikian bercanggah dengan terma tersirat PPH bahawa masa adalah inti pati kontrak (lihat perenggan 56).

(6) (oleh **Kang Hwee Gee HMR**, menentang) Masa bukanlah inti pati perjanjian. Ini disiratkan dalam kl 1.2 Jadual 4 PPH, yang bertujuan untuk memberi manfaat kepada kedua-dua pihak dengan membenarkan perayu untuk menggunakan sepenuhnya keuntungan daripada pembangunan bermula pada bila-bila masa yang dirasakan paling sesuai. Dalam hal keadaan ini, pembatalan PPH oleh responden-responden sebelum tamat tempoh 15 tahun hanya boleh dibenarkan di bawah doktrin mungkir dalam jangkaan di bawah undang-undang kontrak. Dalam kes ini, memandangkan adalah fakta bahawa di bawah PPH, perayu mempunyai kawalan dan pengurusan penuh semua perkara-perkara yang yang berkaitan dengan pembangunan, ia adalah terlalu awal bagi responden-responden membatalkan PPH melalui notis penamatan bertarikh 25 Oktober 2007, semata-mata atas alasan bahawa

perayu tidak berupaya melengkapkan pembangunan sebelum tamat tempoh 15 tahun. Suatu mungkir dalam jangkaan berdasarkan ketidakupayaan untuk melaksanakan memerlukan responden-responden menunjukkan bahawa kontrak itu sebenarnya mustahil dilaksanakan kerana kesalahan pihak lain. Di samping itu, untuk memenuhi keperluan melengkapkan pembangunan sebelum tempoh 15 tahun, perayu tidak perlu membangunkan keseluruhan tanah pembangunan, tetapi hanya sebahagian daripadanya (lihat perenggan 58–59 & 66).]

**Notes**

For cases on termination generally, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5277–5315.

**Cases referred to**

*Ahmad Ismail v Malaya Motor Company & Anor* [1973] 2 MLJ 66, FC (refd)
*Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 (refd)
*Fercometal SARL v Mediterranean Shipping Co SA; The Simona* [1988] 2 All ER 742, HL (refd)
*Heyman and another v Darwins Ltd* [1942] 1 All ER 337, HL (refd)
*Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, HL (refd)
*Unitramp v Garnac Grain Co Inc (The 'Hermine')* [1979] 1 Lloyd's Rep 212, CA (refd)
*Universal Cargo Carriers Corporation v Citati* [1957] 2 All ER 70; [1957] 2 QB 401 (refd)

**Legislation referred to**

Contracts Act 1950 ss 47, 56(1)

**Appeal from**: Civil Suit No S4–22–1432 of 2007 (High Court, Kuala Lumpur)

*Alex de Silva (S Shamalah with him) (Bodipalar Ponnudurai de Silva) for the appellant.*
*Tommy Thomas (Alan Gomez with him) (Tommy Thomas) for the respondents.*

**Mohd Hishamudin Yunus JCA:**

PRELIMINARY

**[1]** This is an appeal by the appellant plaintiff against the decision of the High Court of Kuala Lumpur dismissing the appellant's/plaintiff's claim for (among others):

(a) a declaration that the notice of termination dated 25 October 2007 issued by the respondents/defendants terminating an agreement of 7 January 1993 ('property development agreement') between the appellant and the respondents was unlawfully issued, and hence invalid; and

(b) a consequential order for the specific performance of the property development agreement.

**[2]** We, by a majority decision (Kang Hwee Gee JCA dissenting), have dismissed the appeal with costs. We now give our grounds.

**[3]** In our judgment, on the facts of the case and upon examining the relevant provisions of the property development agreement, there is no merit in the appeal. We are of the opinion that there was a repudiatory breach on the part of the appellant and therefore the notice of termination was lawfully issued by the respondents. Hence, we uphold the decision of the learned High Court judge.

**[4]** We shall elaborate on our grounds.

**[5]** The material facts of the case are not seriously disputed. The issues revolve around construing the provisions of the property development agreement. Before we set out the relevant provisions of the property development agreement, we shall first allude to the background that led to the dispute between the parties.

THE BACKGROUND FACTS

**[6]** The first respondent/first defendant, that is, Bungsar Hill Holdings Sdn Bhd ('first respondent' or 'Bungsar Hill'), is the registered owner of an area of land in Damansara Heights, Kuala Lumpur, of approximately 54 acres. The first respondent intended to develop the land into a township with its commercial, office and residential sectors, the township to be known as the 'Damansara Town Centre'.

**[7]** So, on 9 February 1983, the first respondent entered into an agreement with a company known as Pusat Bandar Damansara Sdn Bhd (not a party to the action; 'Pusat Bandar Damansara'). By this agreement, the first respondent granted Pusat Bandar Damansara the right to construct and develop on a part of the area of Damansara Town Centre. Pursuant to this agreement, Pusat Bandar Damansara constructed on about 9.5 acres of the land nine blocks of building for office or commercial use (these nine blocks of building together with the 9.5 acres of land on which they are erected shall be referred to in this judgment as the 'property').

**[8]** Ten years later, by an agreement of 7 January 1993 ('the second agreement'), between three parties, namely,:

(a) the first respondent;

(b) the second respondent/second defendant (Editry Sdn Bhd, who in this judgment shall be referred to as 'Editry'); and

(c) Pusat Bandar Damansara,

Pusat Bandar Damansara surrendered and renounced its right to develop an area of the Damansara Town Centre that adjoins the property (that is, the 9.5 acres of land on which Pusat Bandar Damansara had built the nine blocks of building). This adjoining land has an area of approximately 15.5 acres. The parties to this second agreement refer to this area as the 'development property'. This development property was previously held under three titles, namely:

(a) part of Lot 8345, Grant No 10474 (the 'first lot');

(b) part of Lot 1502, HS(D) 31780 (the 'second lot'); and

(c) part of Lot 47054, H S (D) 4652 (the 'third lot').

**[9]** The development property is now held under HS(D) 100364, PT 5785, Mukim Kuala Lumpur. Also by this second agreement, as a consideration, the first respondent (Bungsar Hill) granted the second respondent (Editry) the right to develop the development property.

**[10]** Apart from the above second agreement, there is also another agreement entered into on the same day (7 January 1993). This agreement is called the 'acquisition agreement'. The parties to this agreement are the appellant (Damansara Realty Bhd), the first respondent (Bungsar Hill) and Pusat Bandar Damansara. By this agreement, Pusat Bandar Damansara, with the consent of the first respondent, agreed to sell the property (the 9.5 acres of land together with the nine office blocks built on the land by Pusat Bandar Damansara) to the appellant for RM600m.

## THE AGREEMENT IN ISSUE: THE PROPERTY DEVELOPMENT AGREEMENT

**[11]** Yet, by another related written agreement, also dated 7 January 1993 (property development agreement), entered into between the appellant (Damansara Realty Bhd) and the respondents (Bungsar Hill and Editry), the appellant was granted the right to develop the development property (that is, the three parcels of adjoining lands in Damansara Heights with an area of approximately 15.5 acres) for a term of 15 years effective from the date of the completion of the 'acquisition agreement' ('development rights'). The acquisition agreement was completed on or about 4 July 1994. Accordingly,

the appellant's right to exercise the development rights pursuant to the property development agreement will expire on 4 July 2009.

**[12]** However, 13 years and three months later, the respondents issued a notice of termination by way of a letter dated 25 October 2007, giving the appellant 30 days' notice of their intention to terminate the property development agreement. The respondents' termination notice expressly states that they are of the view that the breach complained of is 'incapable of rectification'.

**[13]** Aggrieved by the termination notice, the appellant commenced an action in the Kuala Lumpur High Court against the respondents for various declarations and orders to the effect that the respondents' termination notice was premature and unlawfully issued and hence the appellant ought to be allowed to exercise the right to develop the development property for the unexpired period. This action was dismissed by the High Court and this led to the present appeal.

THE APPELLANT'S CASE

**[14]** In its submission the appellant contends that it was granted the right to develop the development property for 15 years pursuant to cl 1.1 of the property development agreement. The appellant is given 15 years to 'commence development' by obtaining a development order from the relevant authority, meaning the Dewan Bandaraya Kuala Lumpur ('DBKL'). Once a development order has been obtained, the appellant is 'deemed' to have commenced development and is obliged to develop that area for which the development order was obtained within three years from the date of the development order.

**[15]** The appellant takes the position that the property development agreement gives the appellant the discretion as to when to commence development, and that the appellant may commence development any time during the 15 year provided so long as the appellant is prepared to pay a higher 'development property value' the longer the appellant takes to obtain a development order. The appellant contends that the right to obtain the development order is preserved until the right expires on 4 July 2009.

**[16]** It is further argued by the appellant that the property development agreement does not require the appellant to commence and complete the development of the whole 15.5 acres of the development property within the 15 year period. However, the appellant must commence development by applying for and obtaining a development order for any part of the development property within 15 years, ie by 4 July 2009. From the appellant's

stand point, what is granted for a term of 15 years is the right to develop the development property. The appellant is given 15 years to exercise that right.

**[17]** The appellant further submits that as at 25 October 2007, when the notice of termination was issued, it had not repudiated the property development agreement by conduct, although as until that date it had not even applied for a development order. The appellant contends that it still had time to commence development by obtaining a development order in the remaining unexpired 20 months. The appellant also contends that as at May 2008 (the significance of this May 2008 date will be apparent later in this judgment), the appellant was in a position to apply for a development order. There is still about 14 months (from May 2008) left for the appellant to obtain a development order. Hence, the notice of termination issued by the respondents was premature and bad in law.

THE RESPONDENTS' CASE

**[18]** The respondents, on the other hand, contend that the property development agreement requires the appellant to commence and to complete the development within the 15 year period, that is to say, the 15.5 acres of land must be completely developed by 4 July 2009.

**[19]** As the appellant had not commenced any development by 25 October 2007, the appellant is not in a position to commence and complete the development of the development property within the prescribed time frame, that is, by 4 July 2009.

**[20]** It is the contention of the respondents that even as late as 25 October 2007 the appellant had not even submitted an application for a development order to DBKL; and this being the case there is no possibility for the appellant to complete the development by 4 July 2009. The respondents submit that the appellant, by its conduct, had committed a repudiatory breach of the property development agreement, and this entitles the respondents to issue the notice of termination on 25 October 2007.

**[21]** The respondents submit that although there is no provision in the property development agreement that prescribes as to when the development is to start, or that the development must be completed within 15 years, nevertheless it is fair and reasonable to interpret the agreement to mean that the appellant must commence *and* complete the development within 15 years, that is to say, by 4 July 2009.

**[22]** It is the contention of the respondents that, despite the passage of more than 13 years, the appellant had not taken any step to commence development

of the development property. No application for a development order was ever submitted by the appellant to DBKL, let alone obtaining a development order.

**[23]** The respondents argue that the appellant had not taken the necessary steps that would have enabled it to take possession of the development property; and that the appellant had not paid the second respondent (Editry) the appropriate 'development property value'. Vacant possession of the development property has also remained and continues to remain with the first respondent who was, and is, at all material times, the registered proprietor of the development property.

**[24]** It is pointed out by the respondents that no monitoring committee was ever set up or even proposed by the appellant; and nor had the appellant observed any of its development obligations under cl 5 or the Second Schedule of the property development agreement.

**[25]** The respondents further contend that since no development had been carried out at all by the appellant, therefore, by their own omission or neglect, the appellant had not exercised its development rights; and thus there is a repudiatory breach which entitles the respondents to issue a notice of termination pursuant to cl 16 of the property development agreement. The respondents submit that the breach on the part of the appellant was not rectifiable within the 30 day period contemplated by cl 16. It is so because it is a practical impossibility even to *commence* the development of the development property, let alone to complete the development project, within the one month notice period as prescribed by cl 16.

THE EVIDENCE

**[26]** The appellant states in evidence that it is ever willing and able to exercise its rights under the property development agreement but was merely waiting for the right moment. The appellant's evidence is that after being served with the termination notice by the respondents, it had, by a letter dated 24 December 2007, appointed a company known as Damansara Assets Sdn Bhd ('Damansara Assets') as its turnkey contractor to manage the development of the development property on the basis that Damansara Assets was to design, build and finance the development. By the same letter of appointment, Damansara Assets was required to immediately take the necessary steps to appoint consultants to draw up the conceptual plans and procure such development plans and other documents as may be necessary for submission to Dewan Bandaraya Kuala Lumpur for approval and issuance of the development order. Subsequent to the appointment, Damansara Assets has prepared the layout plan and forwarded it to the first respondent on 7 May 2008 for the same to be executed by the first respondent as the landowner for

approval of Dewan Bandaraya Kuala Lumpur for the issuance of the development order. The layout plans were, however, returned to the appellant's solicitors via a letter of the first respondent's solicitors dated 8 May 2008.

**[27]** On the part of the respondents, evidence was adduced to show that even as early as 1995 they were already very concerned about the delay on the part of the appellant to commence the development of property. The second respondent's letter of 4 July 1995 to the appellant had indicated that the development was overdue. Similar views of the respondents were also expressed in the letters of the respondents dated 16 September 1997 and 30 May 1998. The respondents reiterate that despite more than 13 years having lapsed, the appellant had not taken any step to commence development. No payment has ever been made for what is known as the development property value as provided for under s 1 of the Fourth Schedule of the property development agreement. No monitoring committee has ever been set up. The respondents submit that it is impossible for the appellant to undertake and complete the project considering the numerous procedures and approvals that have to be obtained from the various government agencies and authorities concerning the development. According to the evidence of Mr Steven Thang Boon Ann ('DW2'), a registered architect since 1990, and who is a witness for the respondents, for the proposed project, which comes under the 'one stop centre' policy introduced by the authorities, and considering the size of the proposed project, the timeline involved in the issuance of the development order for the proposed project would be approximately 24 months upon submission. We propose to set out here the relevant portion of his evidence:

> 17 Q: What happened in May 2007?
>
> A: New procedures were introduced in April 2007 whereby Government shortened the delivery of approvals for Development Orders and Building Plans.
>
> 18 Q: Could you please refer to page 91 of CBD 2. Are you familiar with this document?
>
> A: Yes, I have studied the document.
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> 19 Q: Could you please describe this document to the Court?
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> A: It is a Site Plan, Location Plan and Development Data ('Site Plan') that I believe was prepared for Damansara Realty in April 2008 for submission to DBKL for a Development Order.
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> 20 Q: Could you confirm that the development proposed in this Site Plan ('the Proposed 2008 Project') would fall within the new submission procedure and that the post April 2007 time-lines would apply?
>
> A: Yes, I confirm that.
>
> Q: Based on this Site Plan, how many buildings were proposed for development?

A: The buildings that were proposed for development have been marked 'A' to 'J' in the Site Plan, and it appears, amount to 10 buildings, consisting of:

(i) 4 blocks of 28 storey Office Towers, with 5 levels of basement car parks (Blocks A to C and E);

(ii) 1–38 storey Office Tower, with 5 levels of basement car parks (Block D);

(iii) 1–30 storey Hotel Tower, with 5 levels of basement carparks (Block F);

(iv) 2–30 storey Service Apartments, with 5 levels of basement car parks (Blocks G and H);

(v) 2–4 to 6 storey Commercial and Entertainment Complex Podiums, with 5 levels of basement carparks (both marked as Block J).

22*Q: Could you please describe the submission procedures required and time-lines involved for the Proposed 2008 Project?*

A: After April 2007, and with the introduction of the 'One Stop Centre' policy, applications for approvals of Development Orders and Building Plans are submitted together and will be approved together. Government has essentially consolidated the previous 2-step process of obtaining the Development Order and Building Plan approvals under its One Stop Centre policy.

From my experience, the time-lines involved in obtaining a Development Order and the Building Plan approval for a development of the scale and magnitude of the Proposed 2008 Project would be approximately 24 months upon submission.

Obviously, more time would be required for preparation of the relevant drawings for submission to DBKL as the drawings applicable for both the Development Order and approval of Building Plans would have to be submitted together. For the Proposed 2008 Project the relevant drawings would take approximately 8 to 10 months.

ISSUE FOR DETERMINATION

**[28]** The issue for determination is whether the notice of termination issued by the respondents was valid. This in turn depends upon a determination of the question as to whether the appellant had committed a repudiatory breach of the property development agreement. Whether or not there was a repudiatory breach depends upon the construction of the property development agreement: whether upon a proper construction of the agreement, the appellant is under an obligation to commence *and* complete the development of the development property within the 15-year period commencing 4 July 1994 and expiring on 4 July 2009; or, whether the appellant may commence development at any time within the 15 year period, in other words, whether the appellant has *until* 4 July 2009 to obtain the development order; and that it has no legal obligation under the property development agreement to complete the development of the development property within the 15 year period.

A RELEVANT PROVISIONS OF THE AGREEMENT

**[29]** In order to determine as to whether or not there was a repudiatory breach of the agreement on the part of the appellant, it is relevant to consider some of the clauses in the agreement. In our view the following clauses are relevant for consideration.

**[30]** Clause 1 of the property development agreement provides that the second respondent grants the appellant the right to develop the development property for a period of 15 years from the date of completion of the property sale agreement.

**[31]** In cl 3.1, the appellant agrees to use its best endeavours to procure that the development is begun and completed in accordance with the agreement, and the sale of units constructed thereon 'is effected in a timely manner'.

**[32]** Under cl 4.4 of the property development agreement, the appellant is only entitled to take possession of the development property upon application being made for a development order to DBKL for that part or portion of the development property.

**[33]** Clause 5.2 of the property development agreement provides that for the purposes of ensuring compliance with the agreement, a monitoring committee, comprising six members, three of whom shall be jointly nominated by the respondents and three of whom shall be nominated by the appellant, shall be formed. Clause 5.2 further provides that the monitoring committee shall meet from time to time, and shall be entitled to examine the books, records, matters or things relating to the development.

**[34]** The detailed obligations of the appellant in carrying out the development are set out in ten sections in the Second Schedule.

**[35]** Section 1.3 of the Fourth Schedule of the property development agreement states that the development shall be deemed to have commenced when a development order is granted by the relevant authority; and the appellant 'shall complete each such part of phase of the development within 3 years of its commencement'.

**[36]** Under s 2.1 of the same Schedule, the appellant agrees to pay the second respondent the appropriate 'development property value' on the date the development order is obtained from the relevant authority or on physical possession being given to the appellant of such part of phase of the development property, whichever is earlier.

**[37]** The scheme of the property development agreement is that the development of the development property was to be carried out in phases over time, the maximum time being 15 years.

**[38]** On the termination of the agreement, cl 16.1 provides as follows:

> 16.1 In the event of a material breach of this agreement by the company the landowner or the new developer or both shall be entitled to give notice to the company to rectify the breach within thirty (30) days the landowner and the new developer shall be entitled to terminate this agreement summarily and thereupon the Development Property shall revert back to the landowner and the new developer and the landowner and the new developer shall be entitled to take such steps and actions as shall be necessary to repossess the Development Property.

THE INTERPRETATION OF THIS COURT

**[39]** The learned High Court judge makes the following finding:

> Having construed the contract entered into between the parties herein, it is my considered view that it was the intention of the parties to be engaged in a relationship where the plaintiff would undertake to complete the project within the 15 year period.

**[40]** With respect, we agree with this view. We are of the opinion that the agreement imposes on the appellant an obligation not just to commence development by applying and obtaining a development order but also an obligation to *complete* the development of the entire 15.5 acres within the 15 year period.

**[41]** We are of the view that the appellant was under an obligation to apply for a development order within a reasonable time and after having obtained the development order to diligently develop the development property to completion within the 15 year period. In our opinion, it is implicit in the agreement that time is the essence and the obligation to develop the development property is to be carried out with due diligence and in accordance with the provisions of the property development agreement, particularly, the Fourth Schedule. Several provisions of the agreement lend support to such an interpretation. Examples of such clauses are cl 3.1 (the appellant to use its best endeavours to ensure that the development is begun and completed in accordance with the agreement), cl 5.2 (providing for the setting up of a monitoring committee), and s 1.3 of the Fourth Schedule (the appellant to complete each phase of the development within three years of its commencement). Therefore, we agree with the learned judge as to the following view expressed by him:

A

> The real nature of the transaction in the instant case is that the parties intended to have the subject land be developed within the 15 years period. It would be utterly absurd to hold on to the plaintiff's view that they have 15 years to start the project and if they decide to start it by obtaining the development order on the 14 year, they will have another three years to complete it. It cannot be so.

B

**[42]** The property development agreement is a commercial contract. Being a commercial contract, the agreement must be construed in a commercially sensible manner, that is to say, in a manner in which a reasonable commercial C person would construe them. Lord Steyn, in his judgment in the House of Lords case of *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, states the rationale for such an approach:

D

> In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.

E

**[43]** With respect we are not able to agree with the construction of the property development agreement as submitted by learned counsel for the appellant. We do not think that it was the intention of the parties that the F appellant may commence development at any time within the 15 year period, and that it was lawful for the appellant not to have commenced any development even after more than 13 years. Such an interpretation does not make sense at all. Certainly it is not a commercially sensible construction of the agreement.

G

**[44]** We accept the contention of learned counsel for the respondents that the development of the development property is a fundamental term of the property development agreement. The significance of development is H reinforced by cl 9 of the agreement that provides that the appellant is to pay the appropriate development property value and the share of the net revenue to the second respondent in the manner as set out in the Fourth Schedule.

**[45]** We reiterate what we have said earlier that it is implicit in the provisions I of the property development agreement that time is the essence of the contract; and in any event there is s 47 of the Contracts Act 1950 that stipulates —

> Time for performance of promise where no application is to be made and no time is specified.

47 Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation — The question 'what is a reasonable time' is, in each particular case, a question of fact.

**[46]** This means that the appellant is not at liberty to take its own sweet time in carrying out the development. It must with due diligence apply for a development order and building plans approval from DBKL as soon as possible.

WHETHER THERE WAS A REPUDIATORY BREACH

**[47]** In addressing this issue we propose to begin by alluding to the basic principles. Even in a case where time is not the essence it has been held that where the delay in the performance of a contract becomes so prolonged as to go to the root of the contract, the aggrieved party is entitled to rescind the contract (see *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401).

**[48]** In *Unitramp v Garnac Grain Co Inc (The 'Hermine')* [1979] 1 Lloyd's Rep 212, it was held that the governing test in determining whether any delay on the part of a party to a contract in performing his obligation is sufficient to justify the other party treating the contract as being repudiated is whether such delay 'would frustrate the commercial adventure'. In other words, the conduct of the defaulting party does not just result in a commercially unacceptable delay but is so serious so as to frustrate the adventure.

**[49]** In our judgment, on the facts of the present case, it is plain and obvious that the venture has been frustrated by the conduct of the appellant.

**[50]** We are of the view that the failure on the part of the appellant to even apply to DBKL for a development order (let alone to obtain such an order) even as late as 25 October 2007 amounts to a repudiatory breach on the part of the appellant. It is a breach that goes to the root of the contract (see *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361). There is the fact that the appellant's layout plan for submissions to DBKL for the purpose of obtaining the development order had been rejected by the first respondent via the latter's letter of 8 May 2008 because the application was improper in that it was not accompanied by the essential documents and information. But even assuming for a moment that the first respondent had supported the appellant's submission of the application for a development order made in May 2008, still there is no possibility of the development order being issued by DBKL within the remaining 14 months, that is to say, before

the expiration of the development period (4 July 2009). As we have said earlier, the respondents' witness, DW2, in his evidence, had stated that it would take around 24 months after submission for DBKL to issue the development order. His evidence was uncontroverted. In fact, DW2 even went further to state that what has been proposed to be submitted by the appellant for the proposed project is not sufficient for DBKL's approval for the development order. In his evidence he said:

> 23 Q: Is the Site Plan sufficient for submission to DBKL for a Development Order and Building Plan approval under the new One Stop Centre policy?
>
> A: No, it is not.
>
> 24 Q: Why not?
>
> A: I have only sighted the Site Plan for the Proposed 2008 Project in the Bundles of Documents that have been filed in this suit. I have not sighted, amongst others, the Building Floor Plans, the Elevations, the Cross Section Plans, Earthwork Plans, Foundation Plans, and 3-D Perspective View, all of which would be required for submission to DBKL for a Development Order and the Building Plan Approval for the Proposed 2008 Project in the Bundles of Documents that have been filed in this suit. Without these, the submissions to DBKL would be incomplete for submission for Development Order and Building Plan Approval.

**[51]** Even assuming for a moment that the appellant was able to obtain the development order a few months before the expiration of the 15 year period, still, considering the size of the land area and the magnitude of the proposed project, common sense will tell that it was impossible for the appellant to carry out any substantial or meaningful development in the development property within such a short period of time, let alone to complete the development of the whole area of 15.5 acres. The respondents were therefore entitled to bring the contract to an end by accepting the implied repudiation. Hence, it was within the respondents' right to issue the letter of termination of 25 October 2007. In the House of Lords case of *Fercometal SARL v Mediterranean Shipping Co SA; The Simona* [1988] 2 All ER 742, Lord Ackner said (at p 747):

> When one party wrongly refuses to perform obligations, this will not automatically bring the contract to an end. The innocent party has an option. He may either accept the wrongful repudiation as determining the contract and sue for damages or he may ignore or reject the attempt to determine the contract and affirm its existence …

**[52]** We have s 56(1) of the Contracts Act 1950 that states:

> Effect of failure to perform at fixed time, in contract in which time is essential
>
> 56(1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been

performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

**[53]** In our judgment, the appellant had failed to commence and to complete the development 'at or before the specified time', the 'specified time' being the 15 year period commencing 4 July 1994 and ending on 4 July 2009. Hence, there was an implied repudiation of the agreement by the appellant by its conduct, in particular, its conduct in not submitting an application for development order to DBKL even as late as 25 October 2007. In the *Law of Contract* by Sinnadurai, (3rd Ed), Vol 1, the learned author wrote (p 677, para 12.17):

> More often than not, the party does not expressly indicate his refusal and difficulties may arise as to when the innocent party, in such circumstances, may treat the contract as being discharged: see *Freeth v Burr* (1874) LR 9 CP 208, and the leading case of *Mersey Steel and Iron Co v Naylor, Benzon and Co* (1882) 9 QBD 648). The intention not to perform the promise in such cases has to be gathered from the surrounding facts of the case.

**[54]** We are, of course, mindful of the fact that at the time the notice of termination was issued the 15 year period had yet to expire. But the uncontroverted evidence is that even as late as the date of the respondents' notice of termination (25 October 2007) the appellant was in no position even to obtain a development order and building plan approval. This being the situation, in law the respondents need not have to wait until the expiry of the 15 year period to issue the termination notice. For, by 25 October 2007, the appellant, by its conduct, was clearly already in breach of the property development agreement.

**[55]** It is the contention of learned counsel for the appellant that even assuming that it managed to obtain the development order only some time towards the end of the 15 year period (say, for example, on 3 July 2009), then, by virtue of s 1.3 of the Fourth Schedule, the period for development is automatically extended for a period of three years beyond the expiration date of 4 July 2009. Section 1.3 of the Fourth Schedule states:

> 1.3 For these purposes Development shall be deemed to have commenced in respect of any part or phase of the Development Property for which a Development Order has been granted by the relevant authorities and the Company shall complete each such part or phase of the Development within 3 years of its commencement.

**[56]** With respect we are unable to accept such an interpretation. Firstly, such an interpretation is far fetched and tantamount to reading words that are not there into the agreement. There is no provision for an automatic right to an extension in the agreement in the event the appellant obtained the

development order at the eleventh hour. If parties had in mind such an extension of the development period, surely such an important term would have been provided for in the property development agreement and not merely to be implied through interpretation. Secondly, such an interpretation is not a commercially sensible interpretation and renders meaningless the very purpose of the agreement, that is, for the development property to be developed by the appellant over a period of 15 years. Thirdly, such an interpretation is contrary to the implied term of the agreement that time is the essence of the contract. Fourthly, considering the magnitude of the proposed project and the area of 15.5 acres, it is just not possible for the appellant to implement the whole project that they had proposed in the development property within three years.

**Kang Hwee Gee JCA (dissenting):**

**[57]** Clause 1 of the property development agreement ('PDA') which gave the appellant the right to develop the development property for 'a term of 15 years' is somewhat imprecise. But in the context in which it was set, the term should be read in the literal sense to mean that the appellant had been given 15 years to develop and complete the development property.

**[58]** Time is not of the essence in so far as the appellant was required to begin development as no time was set in the PDA within which the appellant must perform its obligations. Nor was the appellant required to begin development within any reasonable time as it had the right to decide on the appropriate time it deemed fit to begin development. This is implicit in cl 1.2 Schedule 4 which increases the development property Value that it would have to pay the respondents by 10% for every three years the development is delayed. The clause it would appear was intended to benefit both the parties by allowing the appellant to optimise the gain from the development by commencing it at the most opportune time it saw fit.

**[59]** The rescission of the PDA by the respondents before the expiry of 15 years can only be justified under the doctrine of anticipatory breach in contract law.

**[60]** The doctrine may be understood by referring to the (29th Ed) of *Chitty on Contracts* at p 24-021:

> If, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part, this constitutes an 'anticipatory breach' of the contract and entitles the other party to take one of two

courses. He may 'accept' the renunciation, treat it as discharging him from further performance, and sue for damages forthwith, or he may wait till the time for performance arrives and then sue.

**[61]** Devlin J in *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401; [1957] 2 All ER 70, a shipping case involving the breach of a charterparty where the owner of the ship terminated the contract before the charterer was in actual breach in anticipation that the charterer would not be able to get a cargo on the ship in time, identified 'two forms of anticipatory breach (which) have a common characteristic that is essential to the concept, namely, that the injured party is allowed to anticipate an inevitable breach', that is to say:

(a) where the promisor has indicated by words or conduct that he will not perform on the day; or

(b) where he has put it out of his power to perform on the day he is to perform.

**[62]** The principle in *Universal Cargo* was applied by our Federal Court in *Ahmad Ismail v Malaya Motor Company & Anor* [1973] 2 MLJ 66 wherein the following passage from the judgment of Lord Porter in *Heyman and another v Darwins Ltd* [1942] 1 All ER 337 was cited with approval:

> The three sets of circumstances giving rise to a discharge of contract are tabulated by (*Anson's Law of Contract*, (20th Ed), at p 319) as: (i) renunciation by a party of his liabilities under it; (ii) impossibility created by his own act; and (iii) total or partial failure of performance. In the case of the first two the renunciation may occur or impossibility be created either before or at the time for performance. In the case of the third, it can occur only at the time or during the course of performance.
>
> The third of these is the ordinary case of actual breach and the first two state the two modes of anticipatory breach …

**[63]** Of more relevance to the issue at hand however, is the following passage in *Universal Cargo* cited by Devlin J, from *Smith's Leading Cases*, (13th Ed), Vol II at p 40 to illustrate the 'impossibility' point:

> A party is deemed to have incapacitated himself from performing his side of the contract, not only when he deliberately puts out of his power to perform the contract, but by his own act or default circumstances arise which render him unable to perform his side of the contract or some essential part thereof.

**[64]** Now, to be able to rescind the PDA before the 15 years was up, the respondents would have to show either that the conduct of the appellant in failing to initiate development of the property any sooner was such as to lead a reasonable man to believe that he did not intend or will not perform on the day,

or that he has on the facts put himself out of his power to complete the development or part thereof within the 15 year period granted in the PDA.

**[65]** The appellant it is clear, had not indicated by words or conduct that he will not perform on the day. The evidence of its assistant general manager, Uthaya Kumar a/l Marimuthu by his witness statement given at the trial before the High Court, disclosed that the respondents were aware that the delay in commencing development was primarily due to the crippling financial crisis of 1997/1998 which had a negative effect on the property market. Nor had the appellant put it out of its power to perform on the day it was to perform. The onus of proving that a party to a contract has put it out of his power to perform his contract is necessarily onerous. To illustrate the point Suffian FJ (as he then was) in *Ahmad Ismail v Malaya Motor Company*, alluded to the following passage in *Universal Cargo*:

> Suppose, for example, that a man promises to marry a woman on a future date, or to execute a lease, or to deliver goods; and that before the day arrives he marries another, or executes the lease in favour of another, or delivers the goods to a third party. The aggrieved party may sue at once. Lord Campbell CJ observed in *Hochster v De la Tour* 118 ER 922:
>
> One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day; but this does not necessarily follow; for prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff.

**[66]** Under the recital of the PDA 'a reference to Development is a reference to the whole or any part or phase of it as the circumstance may require'. It follows that to satisfy the requirement of completing the development before the term of 15 years, it need not have to develop the whole development land but only a part or phase thereof. Given the fact that under the PDA the appellant had full control and management of all matters relating to the development including the preparation of the development plans and the right to make amendments without the consent of the respondents, it is in my view, too soon for the respondents to rescind the PDA a year and eight months (20 months) by the notice dated 25 October 2007 merely on the ground that the appellant was incapable of completing the development before the expiry of the term of 15 years. An anticipatory breach based on inability to perform would require the respondents to 'show that the contract was in fact impossible of performance due to the other party's default' and this 'must be proved in fact and not in supposition' (*Chitty on Contracts*, (29th Ed) at pp 24-029 and 24-030). The tide may be turning against the appellant, but to complete a small part or phase of the development in 20 months was not impossible.

**[67]** On my part, I would allow the appeal with costs.

*Appeal dismissed with costs to be taxed.*

Reported by Kohila Nesan